Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BRUCE VANDERVEEN and
MARY VANDERVEEN,
Petitioners,

v.

CITY OF ARROYO GRANDE, et al,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Bruce and Mary Vanderveen challenge the summary dismissal by the state courts of their 42 U.S.C. Section 1983, federal substantive and procedural due process, equal protection, and facial takings challenges to a city's general plan designation of their 4.9 acre in-fill parcel limiting is uses to "agriculture" when the property has no suitable or economically viable agricultural uses.

The questions presented are:

1. Is the summary dismissal by state courts of federal takings, substantive and procedural due process, equal protection and 42 U.S.C. Section 1983 claims without conducting any evidentiary proceeding consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Do the first prong ripeness requirement of *Williamson County v. Hamilton Bank* and the multiple application requirements of *McDonald, Sommer & Frates v. Yolo County* apply to substantive and procedural due process, equal protection and facial takings claims under 42 USC Section 1983?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners-Plaintiffs-Appellants: Bruce Vanderveen and Mary Vanderveen, husband and wife.

Respondents-Defendants-Appellants: City of Arroyo Grande, a municipal corporation organized under the laws of the State of California, City Council of the City of Arroyo Grande, Planning Commission of the City of Arroyo Grande, Planning Department of the City of Arroyo Grande.

RULE 29.6 STATEMENT

Petitioners are individuals and residents of the State of California, and no parent corporation or publicly held company owns any interest in the property of Petitioners which is the subject of this litigation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

I. THERE IS A WIDESPREAD AND PERVASIVE CONFLICT OF AUTHORITY AS TO WHETHER THE FIRST PRONG OF *WILLIAMSON COUNTY V. HAMILTON BANK* RIPENESS APPLIES TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND TEMPORARY TAKINGS CLAIMS UNDER 42 U.S.C. SECTION 1983. . 12

A. There is a Pervasive Conflict of Appellate Conflict within and between the Federal Circuit Courts of Appeal as to the Application

of Ripeness Doctrine to Substantive and Procedural Due Process, Equal Protection and Facial Takings Claims under 42 U.S.C. Section 1983. 14

B. There is Widespread Conflict between State Court Opinions about whether and how Ripeness Is Applied to the Resolution of Substantive and Procedural Due Process, Equal Protection and Facial Takings Claims Under 42 U.S.C. Section 1983. 19

II. THE CALIFORNIA COURT OF APPEAL ERRED IN AFFIRMING A JUDGMENT DENYING PETITIONERS ANY ADEQUATE STATE LAW REMEDIES TO VINDICATE AND PROTECT THEIR DUE PROCESS, EQUAL PROTECTION AND JUST COMPENSATION RIGHTS UNDER THE UNITED STATES CONSTITUTION AND 42 U.S.C. SECTION 1983. 21

A. Petitioners' Due Process Rights In The Adjudication Of Their Section 1983 Claims Were Violated By The State Courts' Dismissal Of Their Claims Without Any Evidentiary Hearing. 21

B. The Adjudication Of Substantive Due Process And Facial Challenges Is Well Established And Requires A Fair Factual Hearing by State Trial Courts. 24

CONCLUSION 30

APPENDIX

Appendix A: 3/2906 Supreme Court of California Opinion 1a

Appendix B: 2/7/06 California Court of Appeal Order . 2a

Appendix C: 1/9/06 California Court of Appeal Opinion 3a

Appendix D: 9/22/04 Superior Court Judgment 12a

Appendix E: 8/24/04 Superior Court Ruling on Petitioners' Motion for Interlocutory Judgment and Respondents' Motion for Denial of Writ . . . 15a

TABLE OF AUTHORITIES

Cases

A. M. G. Associates v. Springfield,
65 N.J. 101, 319 A.2d 705 (1974) 27

Aged Hawaiians v. Hawaiian Homes Com'n,
78 Hawaii 192, 891 P.2d 279 (Haw. 1995). 20

Agins v. City of Tiburon, 447 U.S. 255,
100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 8

Amsden v. Moran, 904 F.2d 748, 753 (1st Cir.1990),
cert. denied, 498 U.S. 1041, 111 S.Ct. 713,
112 L.Ed.2d 702 (1991) 28

Anthony v. Franklin County,
799 F.2d 681 *reh'g denied,*
804 F.2d 681 (11th Cir. 1986) 18, 22

Arnett v. Myers,
281 F.3d 552 (6th Cir. 2002) 15

Bank of Columbia v. Okely, 4 Wheat,
17 U.S. 235, 4 L.Ed. 559 (1819) 21

Bateson v. Geisse,
857 F.2d 1300 (9th Cir. 1988) 17

Bello v. Walker,
840 F.2d 1124 (3d Cir. 1988) 15, 22

Blumenthal Investment Trusts v. City of West Des Moines,
636 N.W.2d 255 (Iowa Sup. Ct. 2001) 20

Board of County Supervisors of Fairfax County v. Carper,
200 Va. 653, 107 S.E.2d 390 (1959) 28

Boddie v. Connecticut, 401 U.S. 371,
91 S.Ct. 780, 28 L.Ed. 113 (1971) 24

Breneric Assoc. v. City of Del Mar,
69 Cal.app.4th 166, 81 Cal.Rptr.2d 324 (1998) 19

Broadcast Equities, Inc. v. Montgomery County,
123 Md.App. 363, 718 A.2d 648 (Md.App. 1998) . 20

Broughton Trucking & Material, Inc. v. County of Will,
299 Ill.App.3d 576, 171 Ill.Dec. 299,
593 N.E.2d 1119 (Ill. 1992) 20

Caraballo-Seda v. Municipality of Hermingueros,
395 F.3d 7 (1st Cir., 2004) 14

Christopher Lake Dev. Co. v. St. Louis County,
35 F.3d 1269 (8th Cir. 1994) 16

City of Iowa City v. Hagen Elecs., Inc.,
545 N.W.2d 530 (Iowa 1996) 20

Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir.),
cert denied, 469 U.S. 1019, 105 S.Ct. 434,
83 l.Ed.2d 360 (1984) 22

Coniston Corp. v. Village of Hoffman Estates,
844 F.2d 461 (7th Cir. 1988) 16

Corn v. City of Lauderdale Lakes,
816 F.2d 1514 (11th Cir. 1987) 18

Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (App.1985), *aff'd in part, vacated in part*, 149 Ariz. 538, 720 P.2d 513 (1986) 26

Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (lst Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982) 22

Culebras Enters. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) 14

Dale v. City of Mountain View, 55 Cal.App.3d 101 (1976) 25

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 21

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) 17

Dolan v. Tigard, 512 U.S. 374, 1145 S.Ct. 2309, 129 L.Ed.2d 304 (1994) 25

Dougherty v. City of Chicago, 75 F.3d 348 (7th Cir. 1996) 16

Dougherty v. Town of North Hemstead Bd. of Zoning Appeals, 282 F.3d 83 (2d Cir. 2002) 15

Eide v. Sarasota County, 895 F.2d 1326 (11th Cir., 1990) 18

Electro-Tech, Inc. v. H.F. Campbell Co.,
433 Mich. 57, 445 N.W.2d 61 (Mich. 1989) . . 20, 21

Esmail v. Mcrane,
58 F.3d 176 (7th Cir. 1995) 16

Euclid v. Ambler Realty Co., 272 U.S. 365,
47 S.Ct. 114, 71 L.Ed. 303 (1926) 28

Executive 10, Inc. v. Martin County,
922 F.2d 1536 (11th Cir. 1991) 18, 19

Felder v. Casey,
487 U.S. 131, 108 S.Ct. 2302 (1988) 22

First English Evangelical Lutheran Church of Glendale,
482 U.S. 304, 96 L.Ed.2d 250 (1987) 11, 25

Forseth v. Village of Sussex,
199 F.3d 363 (7th Cir. 2000) 16

Galland v. City of Clovis, 24 Cal.4th 1003,
16 P.3d 130 (Cal. 2001) 19

Goldberg Companies, Inc. v. Council of the City of Richmond Heights, 81 Ohio St.3d at 213,
690 N.E.2d 510 (1998) 28

Greenfield Mills, Inc. v. Macklin,
361 F.3d 934 (7th Cir. 2004) 16

Greenbriar, Ltd. v. City of Alabaster,
884 F.2d 1570 (11th Cir. 1989) 18

Hager v. City of West Peoria,
84 F.3d 865 (7th Cir. 1996) 16

Hammond Packing Co., v. Arkansas, 212 U.S. 322,
29 S.Ct. 370, 53 L.Ed. 530 (1897) 24

Harding v. County of Door,
870 F.2d 430 (7th Cir. 1989) 16

Hearn v. City of Gainseville,
688 F.2d 1328 (11th Cir., 1982) 22

Hensler vs. City of Glendale,
8 Cal 4th 1 (1994) 8, 11

Herrington v. County of Sonoma,
834 F.2d 1488 (9th Cir. 1987) 17

Hoehne v. County of San Benito,
870 F.2d 529 (9th Cir. 1989) 18

Home Builders League of So. Jersey, Inc. v. Berlin,
81 N.J. 127, 405 A.2d 381 (1979) 27

Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841,
42 L.Ed. 215 (1897) 24

Hurtado v. California,
110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) . . 21

Kasparek v. Johnhson County Board of Health,
288 N.W.2d 511 (Iowa, 1980) 29

Katobimar Realty Co. v. Webster,
20 N.J. 114, 118 A.2d 824 (1955) 27

Kavanaugh v. Santa Monica Rent Control Board,
16 Cal.4th 76, 941 P.2d 851 (Cal. 1997) 19

Kittay v. Giuliani,
112 F.Supp.2d (S.D.N.Y. 2000) 15

L.A. Ray Realty v. Town Council of Town of Cumberland,
698 A.2d 202 (R.I. 1997) 29

Landmark Land Co. v. Buchanan,
874 F.2d 717 (10th Cir. 1989) 18

Lingle v. Chevron, U.S.A., ____U.S.___ (2005) . . 21, 25

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 23

Long Beach Equities, Inc. v. County of Ventura,
231 Cal.App.3d 1016 . . . . . 19, 20

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340, 106 S.Ct. 2561,
91 L.Ed.2d 285 (1986) . . . . . *passim*

Maryland Reclamation Assocs. v. Harford County,
342 Md. 476, 677 A.2d 567 (Md. 1986) 20

McKenzie v. City of White Hall,
225 F.3d 313 (8th Cir. 1997) 17

Melillo v. City of New Haven,
249 Conn. 138, 732 A.2d 133 (1999) 19

Morris Cty. Land v. Parsippany-Troy Hills,
40 N.J. 539, 193 A.2d 232 (1963) 26, 27

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) . . 24

Nasierowski Bros. Inv. Co. v. City of Sterling Heights,
949 F.2d 890 (6th Cir. 1991) 15

National Land and Investment Co. v. Kohn,
419 Pa. 504, 215 A.2d 597 (1966) 29

Nectow v. City of Cambridge, 277 U.S. 183,
48 S.Ct. 447, 72 L.Ed. 842 (1928) 22, 25

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S.Ct. 3141,
97 L.Ed.2d 677 (1987) 25

Norco Construction v. King County,
801 F.2d. 1143 (9th Cir., 1986) 17

Olech v. Village of Willowbrook,
160 F.3d 386 (7th Cir. 1998) 16

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908,
68 L.Ed.2d 420 (1981) 23

Patsy v. Bd. of Regents of Fla.,
457 U.S. 496, 102 S.Ct. at 2560-63 (1982) . . . 22, 23

Penn Cent. Transp. Co v City of New York,
438 U.S. 104, 98 S.Ct 2646 (1978) 25

Petersen v. City of Decorah,
259 N.W.2d 553 (Iowa Ct.App.1977) 30

Polenz v. Parratt,
883 F.2d 551 (7th Cir. 1989) 16

River Park, Inc. v. City of Highland Park,
23 F.3d 164 (7th Cir. 1994) 16

San Mateo County Coastal Landowners' Assn. v. County of San Mateo,
38 Cal.App.4th 523 (Cal.App. 1995) 20

San Remo Hotel LLP V City and County of San Francisco,
545 U.S. 323 (2005) 13

Seattle Title Trust Co. v. Roberge, 278 U.S. 116,
121 49 S.Ct. 50, 73 L.Ed. 210 (1928) 22, 26

Selby Realty Co. v. City of San Buenaventura,
10 Cal.3d 110 (1973) 25

Shelter Creek Dev. Corp. v. City of Oxnard,
838 F.2d 375 (1988) 17

Sinaloa Lake owners Ass'n v. City of Simi Valley,
882 F.2d 1398 (9th Cir. 1989),
cert. denied, 494 U.S. 1016, 110 S.Ct. 1317,
108 L.Ed.2d 493 (1990) 17

Smith v. City and County of San Francisco,
225 Cal.App.3d 38 (Cal.App. 1990) 20

Societe Internaionale v. Rogers, 357 U.S. 197,
78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) 23, 24

South Gwinnett Venture v. Pruitt,
491 F.2d 5, 7 (5th Cir.) (en banc), *cert. denied*,
419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974) . . 22

Southern Pacific Transp. Co. v. City of Los Angeles,
922 F.2d 498 (9th Cir. 1990) 18

Southview Associates, Ltd v. Bongartz,
980 F.2d 84 (2nd Cir., 1992) 14

Spence v. Zimmerman,
873 F.2d 256 (11th Cir. 1989) 22

Taylor Inv., Ltd., v. Upper Darby Township,
983 F.2d 1285 (3d Cir. 1993) 14

Tenoco Oil Co. v. Department of Consumer Affairs,
876 F.2d 1013 (1st Cir.1989) 28

Traweek v. City and County of San Francisco,
920 F.2d 589 (1990) 17

Unity Ventures v. Lake County ,
841 F.2d 770 (7th Cir. 1988) 16

Village of Euclid, Ohio v. Ambler Realty Co.,
272 U.S. 365, 47 S.Ct. 114,
71 L.Ed. 303 (1926) 22

Village of Willowbrook v. Olech,
528 U.S. 562, 145 L.Ed. 2d 1060 (2000) 25

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Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) . . . . . *passim*

Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876) 24

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) 24

Zaagman, Inc. v. Kentwood, 277 N.W.2d 475, 406 Mich 137 (Mich. 1979) 29

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 123 (1990) 22, 23, 28

Statutes

42 U.S.C. Section 1983 . . . . . *passim*

CAL. Code Civ. Proc. § 430.10(c) 11

CAL. Code Civ. Proc. § 1085 11

CAL. Code Civ. Proc. § 1094 . . . . . *passim*

CAL. Code Civ. Proc. § 1094.5 . . . . . 8, 11

CAL. Gov't Code § 52101 (c) 6

CAL. Gov't Code § 65858 6

Constitutional Provisions

U.S. Const. Amend V . . . . . *passim*
U.S. Const. Amend XIV § 1 . . . . . *passim*

Other

8 E. McQuillin, *The Law of Municipal Corporations* § 25.45 (3d ed. 1965) 29, 30

PETITION FOR A WRIT OF CERTIORARI

Petitioners Bruce Vanderveen and Mary Vanderveen ("Petitioners") respectfully petition for a writ of certiorari to review the opinion of the Supreme Court of California denying Petitioner's petition for review, upholding the opinion of the Court of Appeal of California, Second Appellate District, Division Six, in turn affirming the Judgment based upon Ruling on Petitioners' Motion for Interlocutory Judgment and Respondents' Motion for Denial of Writ entered by the Superior Court of the State of California, for the County of San Luis Obispo.

OPINIONS BELOW

The opinion of the Supreme Court of California filed March 29, 2006, denying petition for review is reproduced in Appendix A, infra, 1a. The California Court of Appeal order denying Petitioners' petition for rehearing filed February 7, 2006, is reproduced in Appendix B, infra, 2a. The California Court of Appeal opinion filed January 9, 2006, is reproduced in Appendix C, infra, 3a-11a. The Superior Court judgment entered September 22, 2004, is reproduced in Appendix D, infra, 12a-14a, and its ruling on petitioners' motion for interlocutory judgment and respondents' motion for denial of writ entered August 24, 2004 is reproduced in Appendix E, infra, 15a-31a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Article III, Section 2, of the Constitution of the United States, for Petitioner's claims arising under the Constitution and Laws of the United States, 42 U.S.C. Section 1983, the due process, equal protection, and takings clauses of the Fifth

and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTION AND STATUTORY PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, provides that:

> "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States, applicable to City and State Respondents through the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. Section 1983 protects Petitioner from city Respondents' actions depriving Petitioner of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

The constitutionality of the application of California Code of Civil Procedure Section 1094 by the state courts to summarily dismiss Petitioners' federal constitutional and statutory claims provides, in pertinent part:

> "If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ."

STATEMENT OF THE CASE

Petitioners Bruce and Mary Vanderveen own a 4.9 acres in-fill parcel in the City of Arroyo Grande which the City in 2003 re-designated under its general plan limiting its uses to agriculture. The property is adjacent to existing residential uses which reduce the net area to 2.5 acres, has no agricultural water supply, is too small for dry farming, and has no economically viable agricultural uses.

Bruce and Mary challenged the general plan designation of their property in state court as a "facial takings", on substantive due process and equal protection grounds, including the violation of 42 U.S.C. Section 1983. The state trial and appellate courts summarily disposed of their federal constitutional claims without a trial, summary judgment motion, or even demurrer, utilizing a vague 1872 statute authorizing the denial of the writ based upon the absence of triable issues of fact.

The California state courts applied the first prong of *Williamson Bank* ripeness doctrine to dismiss all of Petitioner's substantive and procedural due process, equal protection and temporary takings claims under 42 U.S.C. Section 1983, which were joined with state law statutory, equitable and compensation remedies. They also entered judgment on of Petitioners' federal statutory and constitutional claims without affording requisite due process of law in the resolution of disputed factual claims.

This Petition should be granted to secure a uniformity of decision among the various state and federal courts regarding the application of *Williamson Bank* ripeness doctrine to due process and equal protection cases, and to reverse the clear errors of the California courts in violating Petitioners' due process rights in the litigation of their federal constitutional and Section 1983 claims.

Factual Background. During the thirty-two years that Petitioners' property had been designated agricultural under

the city's general plan and zoning ordinances, the City of Arroyo Grande grew dramatically and urbanization adjoined their 4.9 acre parcel.

When the Vanderveens purchased their property in 1995, it was not being farmed and covered largely with weeds. A local farmer had farmed the property until 1964-1965 when it was part of a larger parcel which had riparian water rights to an adjacent creek, and irrigation water was pumped directly from the creek. Subsequently, the property was subdivided into five-acre parcels and Petitioners' property lost its riparian rights to access water from the creek. The size of the property, the lack of an existing irrigation well, and the cost of constructing the well for use on the property, rendered the use of the Petitioners' property agriculturally and economically infeasible. Dry farming on a small parcel produces no ability to meet expenses.

Petitioners wanted to build a single-family residence for their own use and to drill a well to meet the water needs of their home and to utilize an on-site septic system. City officials denied Petitioners permission to supply water from an on-site well or to dispose of waste through an on-site septic system. They were required to expend substantial funds to install water and sewer lines six hundred feet across their property in order to build their home and to pay the city domestic sewer and water charges. As a result, there is no existing water well providing water for either domestic or agricultural purposes on the property. It is not feasible to utilize city water for agricultural purposes because of the high rates which are charged by the City.

In 1997, Petitioners wrote the city community development director asking that their property be rezoned in a pending general plan update because of these facts and that it is too small support viable agriculture. Petitioners submitted a subdivision proposal for 15 residential units, consistent with the adjacent residential densities.

Ultimately, the city council agreed and designated the property for residential uses in 2001. The same farming family which had farmed the property prior to 1965 informed the city that adjacent residential uses required buffers which reduced the net area to 2.5 acres, the property lacked an irrigation water source, and that it was not feasible to farm Petitioners' property.

Civil engineers and planners informed the city council that the "surrounding areas have been developed with residential "development" and that there "is no commercial agricultural development on any parcel surrounding the subject parcel." In July 2001, the city's director of building and fire supported the rezoning because two existing city streets dead-ended at Petitioners' property, and that residential development of Petitioners property resulting in "the extension and interconnection of either, or both of these streets, the access in and out of this area could be greatly improved. This improvement would result in better fire and life safety for the area."

On November 1, 2002, Petitioners' planners and engineers submitted a complete development package to the city's community development department which included maps and documents related to a subdivision proposal for the property.

On December 10, 2002, a new city council held public hearings and directed city staff to return with alternative methods to prevent prime agricultural land conversion. At that public hearing, Petitioners informed the new council that their property does not contain prime agricultural soils and is not economically viable for agricultural purposes.

On December 10, 2002, the city community development department asked for a revised development application. On December 11, 2002, Petitioners submitted additional materials to the community development department. In an apparent effort to slow down Petitioners' development plan processing

and in response to political pressures, the city staff on January 9, 2003, asked for additional information.

On January 14, 2003, the city planning director sent a memorandum to the city council recommending the suspension of the processing of development applications involving conversion of alleged prime farmland soils. A public hearing was held on that date and Petitioners informed the city of that the property was not suitable for viable agricultural uses and did not include prime farmland as defined the city's own technical reports or statewide standards used to protect prime agricultural soils (California Government Code Section 52101(c)).

On the same date, Petitioners' planners and engineers submitted a further package of site plans and drawings of their proposed development to the city's community development department to satisfy the planning director's request for more information.

Three City Council members voted in favor of Ordinance No. 536 on January 14, 2003, which purported to create a moratorium on acceptance of land use applications which seek to develop "prime farmland" soils. California Government Code Section 65858 requires a four-fifths council vote to establish a building moratorium; nonetheless, the city treated the moratorium as lawfully enacted.

On February 18, 2003, Petitioners' planners and engineers submitted to the city color boards and elevations which the city requested. Petitioners objected in writing during March and April, 2003, to the refusal to process their residential development, the illegality of the moratorium, and the proposed agricultural designation of the property.

On July 15, 2003 the city planning commission began the process of re-designating Petitoners' property as agricultural, to which Petitioners' strenuously objected and demanded that their residential development project be processed under the current general plan designation.

On July 22, 2003, the city council held public hearings to re-designate the use of Petitioners' for agriculture, despite Petitioners' objections and insistence that farmers in the area would not consider farming the property due to the proximity of surrounding homes and families, its small size, and lack of an irrigation water source.

On September 16, 2003, Petitioners' and three other properties were re-designated and restricted to agricultural uses by Resolution 3711 ("2003 General Plan Amendment"). Petitioners offered their property to any of the farmers (some ten in number) who were at the public hearings on the general plan amendment and received no takers. The county tax assessor assesses the Petitioners' property for residential purposes at $38,000 per acre. It is not economically feasible to install a water well for agricultural purposes based upon the inability of limited revenues to meet the expenses of any agricultural operation.

Trial Court Proceedings. On November 26, 2003, Petitioners filed in the state lower court a verified petition for writ of mandate, writ of mandamus and complaint for declaratory and injunctive relief and damages for violation of civil rights (42 U.S.C. 1983) inverse condemnation, and takings. The petition and complaint addressed the city's 2003 General Plan Amendment changing the land use designation on their property (and three others) to agricultural uses.

On March 26, 2004, the City served the administrative record and moving papers to deny Petitioners' writ pursuant to California Code of Civil Procedure Section 1094.

On April 9, 2004, Appellants filed a demand for trial by jury. (I CT 230) On April 13, 2004, the City requested a non-jury trial, estimated that the trial would take five to seven days, and indicated that the City would file a motion for summary judgment if necessary after its motion for hearing on denial of the writ. (I CT 235-36)

On April 23, 2004, Petitioners filed a preliminary motion pursuant to California Code of Civil Procedure Section 1094.5(e) for the entry of interlocutory judgment to require the city to consider relevant evidence not previously considered in the city's hearings, including the post-enactment determination by the California State Department of Housing and Community Development of the inadequacy of the city's state-mandated housing element in identifying sufficient sites to meet its fair share of regional housing needs.

On May 21, 2004, Petitioners filed their opposition to the city's motion for summary denial without trial of Petitioners' writ and complaint. Petitioners objected to the city's motion on the grounds it was procedurally improper under *Hensler vs. City of Glendale*, 8 Cal 4th 1, 16 (1994), holding that property owners must bring a writ action challenging the government's actions, but may join state and federal constitutional claims with the writ causes of action and may introduce evidence of their constitutional claims during the trial of the writ.

Petitioners argued that the 2003 General Plan Amendment was facially unconstitutional under *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), in that the general plan amendments advanced no legitimate public purpose because the property contains no prime agricultural soils, not irrigation water, and is not of sufficient size to support economically viable agricultural uses. Petitioners cited the city's judicial admission that the property is a "small lot" less than five acres in size, thereby establishing that the agricultural designation of the property was the equivalent of discriminatory "spot zoning".

The state trial court filed its ruling on Petitioners' motion for interlocutory judgment and Respondents' motion for denial of the writ on August 24, 2004 (App. E, 15a-31a.) Despite the fact that no evidentiary proceeding was held, the trial court proceeded to draw extensive factual conclusions

(Appendix E, 16a-23a.). Based upon those factual conclusions, the state trial court held that the 2003 General Plan Amendment limiting the use of Petitioners' property to agriculture was not arbitrary or capricious, (App. E, 20a-22a) and that it was rationally related to the goal of preserving agriculturally viable lands. The state trial court dismissed Petitioners' substantive and procedural due process and equal protection claims by applying first prong ripeness derived from *William County v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), and applied by this Court in *Mac Donald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 348 (1986), to require multiple applications in "as applied" takings challenges. (App. E, 26a.) The state trial court also summarily dismissed Petitioners' Section 1983 claims on the same grounds. (App. E, 27a.)

On September 9, 2004, Petitioners filed objections to the proposed judgment on the grounds, among others, that there is no constitutional or statutory authority which allows for the adjudication of constitutional and civil rights causes of actions pursuant to California Code of Civil Procedure Section 1094 when there are disputed questions of fact. On September 21, 2004, the state trial court held a hearing concerning objections to the proposed judgment, and Petitioners presented an offer of proof regarding matters which could be further established at an evidentiary hearing on the writ and the constitutional claims, including the facts recited above, the lack of agricultural viability, and that Petitioners had submitted a complete application before the effective date of the city's illegal processing moratorium.

On September 22, 2004, the state lower court entered its judgment. (App., D, 12a-14a.) On October 6, 2004, the City served a notice of entry judgment.

State Appellate Court Proceedings. On October 15, 2004, Petitioners timely filed a notice appeal from the entirety of the trial court judgment. Despite the fact that no evidentiary

proceeding was conducted before the state trial court, the state appellate court applied a substantial evidence standard of review to the "trial court's factual findings". (App. C, 7a.) The state appellate court also found that Petitioners "bear the burden of proving that a land-use regulation is arbitrary or irrational." (App. C., 7a) The state appellate court dismissed Petitioners' federal constitutional claims on the grounds that, "Appellants have not demonstrated that the City has engaged in conduct depriving them of their constitutional rights, ..." (App. C, 10a.)

The state appellate court implicitly relied upon the *MacDonald* reapplication rule and *Williamson County* first prong ripeness, citing "the distinction between the enactment of a [general plan amendment] and the effect it might ultimately have upon an owner's use of the property." (App. C, 8a.) It also relied upon an alleged abandonment of Petitioners' development applications as a grounds to deny Petitioners' substantive due process and facial challenges to the 2003 General Plan Amendment, concluding that Petitioners' constitutional claims were not "ripe for review." (App. C, 9a.)

Petitioner timely filed a petition for rehearing with the state appellate court, calling to its attention numerous errors of fact and law. The appellate court denied without comment the petition for rehearing. (App. B, *infra,* 2a.)

State Supreme Court Proceedings. Petitioner timely filed a petition for review of the court of appeals opinion. The state supreme court filed its order denying the petition for review on March 29, 2006. (App. A, 1a.)

REASONS FOR GRANTING THE PETITION

California Civil Procedure in Property Rights Cases

California civil procedure provides for several methods of disposing of Section 1983 and federal constitutional claims. First, the courts can grant a demurrer on the traditional

grounds that the "pleading does not state facts sufficient to constitution a cause of action." (Ca.Code Civ.Proc., Section 430.10(e).) This was how *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304, 96 L.Ed.2d 250, came to this Court for decision. Second, upon proper notice and extensive procedural protections through the filing of undisputed factual statements and sworn declarations, after an opportunity for complete discovery, the lower court can grant a motion for summary judgment where there are no triable issues of fact. (*Id.* Section 437c.) The procedural strictures mean that the process may not be used to violate due process rights of litigants, through a "catch penny contrivance" to deprive litigants of a trial. *Whitaker v. Coleman*, 115F.2d 305, 307 (5th Cir. 1940).

Third, in cases in which government action is challenged, there are extensive statutory procedures for first overturning the challenged action through traditional mandate (Cal.Code Civ. Pro., Section 1085) or through administrative mandamus (Cal.Code Civ.Pro., Section 1094.5.) The practice of the California courts holding that these mandate remedies were the exclusive remedy for constitutional violations ended (at least explicitly) with this Court's decision in *First English*, supra. Now, the California Supreme Court has held that litigants raising constitutional property rights issues must bring a writ of mandate or mandamus to set aside the offending regulation; but may join their Section 1983 and other state and federal constitutional claims with the mandate causes of action. In *Hensler v. City of Glendale*, 8 Cal.4th 1, 6 (1994), the state supreme court held that requiring a writ of mandate does not create unreasonable procedural barriers to the litigation of Section 1983 constitutional claims, because plaintiffs may join those claims in the writ action and present evidence during the writ trial regarding their constitutional claims. The court recognized that the record of local land use proceedings is not appropriate for the adjudication of federal

property rights claims, due to limitations on evidence, competence, and sworn testimony.

Fourth, as a relic of California's pre-1987 "no compensation jurisprudence," (discussed *infra*) a trial court without the procedural safeguards of summary adjudication may summarily deny the writ and all of the state and federal constitutional claims which the plaintiff had joined with the writ action either because there is "no triable issue of fact" or based solely on an administrative record. It is the state courts' application of this vague and unguided procedure that Petitioners' have challenged throughout this litigation, and now petition this Court to review because if it is clearly offensive to the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

I. THERE IS A WIDESPREAD AND PERVASIVE CONFLICT OF AUTHORITY AS TO WHETHER THE FIRST PRONG OF *WILLIAMSON COUNTY V. HAMILTON BANK* RIPENESS APPLIES TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND TEMPORARY TAKINGS CLAIMS UNDER 42 U.S.C. SECTION 1983.

In *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court held that a Section 1983 claim for money damages stemming from a regulatory takings of property in violation of federal constitutional rights is not ripe for review on the merits until the plaintiff demonstrates that, first, a final decision by the relevant authority regarding application of the regulation to the subject property has been made, *i.e.*, the "initial decision-maker has reached a definitive position on the issue that inflicts an actual, concrete injury," 473 U.S. at 193, 105 S.Ct. at 3120 ("first prong ripeness");

and second, that no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision ("second prong ripeness"). *Id.*, at 196-97, 105 S.Ct. at 3122. This Court's rationale is that, absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right. 473 U.S. at 194 n. 13, 105 S.Ct. at 3121 n. 13 ("The nature of the constitutional right [takings without just compensation] therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Sec. 1983 action.")

The multiple reapplication requirement for "as applied takings" is not applicable to facial challenges. Further, this Court has taught that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain" a final decision from the government agencies. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n. 7, 106 S.Ct. 2561, 2567 n. 7, 91 L.Ed.2d 285 (1986) (citing *Williamson, supra,* 473 U.S. at 205-06, 105 S.Ct. at 3126-27 (Stevens, J. concurring)).

This Court left unresolved in *Williamson County* whether the two-prong ripeness test applies to substantive due process challenges, and because the case did not involve facial takings, equal protection or procedural due process claims, this Court did not have to decide how ripeness applied to those claims. In the intervening years, there has developed a widespread and pervasive conflict of authority as to whether the first, second, or both ripeness prongs apply to these claims, such that it is now prudential for this Court to address these issues.

A consequence of the conflict of authorities is the vastly disparate treatment of property owners throughout the nation depending solely upon where they own property. As Chief Justice Rehnquist explained in his opinion concurring in the judgment in *San Remo Hotel LLP. v. City and County of San Francisco,* 545 U.S. 523 (2005):

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact upon takings plaintiffs is dramatic. ... In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based upon the final decision of a state or local government entity must first seek compensation in state courts."

The confused and contradictory application of *Williamson County* ripeness doctrine to substantive and procedural due process, equal protection and facial takings claims are no less "suspect," its impacts upon plaintiff property owners no less "dramatic," and this is an "appropriate case" for this Court to address these unsettling inconsistencies.

A. There is a Pervasive Conflict of Appellate Conflict within and between the Federal Circuit Courts of Appeal as to the Application of Ripeness Doctrine to Substantive and Procedural Due Process, Equal Protection and Facial Takings Claims under 42 U.S.C. Section 1983.

The First Circuit has applied both prongs of *Williamson County* ripeness doctrine to substantive due process claims in the land use context in *Culebras Enters. Corp. v. Rivera Rios,* 813 F.2d 506, 515-16 (1st Cir. 1987). *Cf. Caraballo-Seda v. Municipality of Hermingueros,* 395 F.3d 7 (1st Cir., 2004).

The Second Circuit's opinion in *Southview Associates, Ltd v. Bongartz,* 980 F.2d 84, 96-98, (2d Cir., 1992) illustrates the gratuitous confusion and unneeded analytical gymnastics involved in attempting to apply *Williamson County* ripeness to due process and equal protection claims. The court held that a substantive due process claim premised on the theory that a "regulation has gone too far is subject to both prongs of the *Williamson* ripeness test." *Id.* at 96. On the other hand,

a substantive due process claim premised upon arbitrary and capricious government conduct "is subject to only the final decision prong of the *Williamson* ripeness test."

The Second Circuit has opined that in certain circumstances a First Amendment claim emanating from a land use dispute may be subject to first prong ripeness requirements. *Dougherty v. Town of North Hemstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir. 2002). However, the court declined to apply the ripeness doctrine where, as in this case, there was an adequate factual record so that the property owner could do "nothing to further define his injury and had alleged an immediate injury." The presence of First Amendment issues should not change the legal principles applicable to Petitioners herein. See also, *Kittay v. Giuliani*, 112 F.Supp.2d 342, 348-49 & n. 5 (S.D.N.Y. 2000) (Parker, J.). *Cf. Kittay v. Giuliani*, 112 F.Supp.2d 342, 348-49 & n. 5 (S.D.N.Y. 2000).

In *Bello v. Walker,* 840 F.2d 1124, 1127-29 (3d Cir. 1988), the Third Circuit accepted plaintiff's substantive due process claim and rejected his procedural due process on the merits, without finding that either first or second prong ripeness had been satisfied. The state court had denied plaintiff's request for injunctive relief but was not asked to consider state compensation remedies. *Id.* A different result was reached in *Taylor Inv., Ltd., v. Upper Darby Township,* 983 F.2d 1285, 1291, 1292 (3d Cir. 1993), where the court applied first prong ripeness to substantive due process, procedural due process and equal protection challenges to a zoning decision.

In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 894 (6th Cir. 1991), the Sixth Circuit held that procedural due process claims are not subject to *Williamson County* ripeness requirements. However, in *Arnett v. Myers,* 281 F.3d 552, 561 (6th Cir. 2002), the court analyzed "claims for denial of procedural due process, equal protection and just

compensation for takings" under both prongs of *Williamson County* ripeness doctrine.

In *Forseth v. Village of Sussex,* 199 F.3d 363 (7th Cir. 2000), involving a challenge to dedication exactions, the Seventh Circuit noted that although it has recognized the potential for a plaintiff to maintain a substantive due process claim in the land use context, "we have yet to excuse any substantive due process claim in the land-use context from *Williamson*'s ripeness requirements." 199 F.2d at 369. Other Seventh Circuit opinions have also considered these issues in contradictory ways. See *Dougherty v. City of Chicago,* 75 F.3d 348 (7th Cir. 1996); *Harding v. County of Door,* 870 F.2d 430, 431 (7th Cir. 1989); *Polenz v. Parratt*, 883 F.2d 551, 558 (7th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467-68 (7th Cir. 1988). And still other Seventh Circuit opinions have applied *Williamson County* ripeness "with full force to due process claims (both procedural and substantive)", rejecting plaintiffs' procedural due process claims. *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 961 (7th Cir. 2004); *Hager v. City of West Peoria,* 84 F.3d 865, 869 (7th Cir. 1996); *River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 167 (7th Cir. 1994); *Unity Ventures v. Lake County* , 841 F.2d 770, 775 (7th Cir. 1988) (applying ripeness to procedural and substantive due process and equal protection claims).

In *Forseth, supra,* however, the Seventh Circuit held that equal protection claims involving the exaction dedication maliciously inspired "is independent from their takings claim and accordingly, is not subject to *Williamson*'s ripeness requirements." 199 F.3d at 371. See also, *Esmail v. Mcrane,* 58 F.3d 176, 180 (7th Cir. 1995); *Olech v. Village of Willowbrook,* 160 F.3d 386, 387-88 (7th Cir. 1998).

In *Christopher Lake Dev. Co. v. St. Louis County,* 35 F.3d 1269, 1273 (8th Cir. 1994), the Eighth Circuit applied ripeness doctrines to Section 1983 substantive and procedural

(*id., n. 5)* due process claims, but not to equal protection claims in land use litigation. In contrast, in *McKenzie v. City of White Hall,* 225 F.3d 313, 318 (8th Cir. 1997), the court held that second prong ripeness did not apply to due process and equal protection claims.

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 920 F.2d 1496, 1507 (9th Cir. 1990), the Ninth Circuit applied *Williamson County* ripeness to substantive due process, procedural due process and equal protection challenges. See also, *Herrington v. County of Sonoma,* 834 F.2d 1488, 1494-95 (9th Cir. 1987); *Shelter Creek Dev. Corp. v. City of Oxnard,* 838 F.2d 375, 379; *Norco Construction v. King County,* 801 F.2d. 1143, 1145 (9th Cir., 1986). In other cases, the Ninth Circuit has not applied *Williamson County* ripeness to procedural due process claims. See, e.g., *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.3d 1398, 1407; *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); LONGTON'S CALIFORNIA LAND USE, Sec. 12.30[5], pp. 913-914.

The inconsistency between the circuits can result in a pandemic-like doctrinal infection, illustrated by the Second Circuit's reliance upon the Ninth Circuit's opinion in *Sinaloa Lake owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1407 (9th Cir. 1989), cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L Ed.2d 493 (1990), to support its holding in *Southview Associates, supra,* that second prong ripeness is not applicable to substantive due process claims based on arbitrary and capricious government conduct.

The inconsistency of Ninth Circuit opinions is demonstrated in the court's opinion in *Traweek v. City and County of San Francisco,* 920 F.2d 589, holding that both prongs of *Williamson County* ripeness "are similarly applicable to appellants' claims for denials of substantive due process, equal protection, and procedural due process", citing, *Hoehne v. County of San Benito,* 870 F.2d 529, 532

(9th Cir. 1989). The inconsistencies are further amplified in *Southern Pacific Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir. 1990), which held that "as applied" equal protection and due process claims are subject to both ripeness prongs, while "facial" equal protection and due process claims are subject to neither.

In *Landmark Land Co. v. Buchanan,* 874 F.2d 717, 722 (10th Cir. 1989), the Tenth Circuit applied first prong ripeness to a substantive due process claim premised on arbitrary and capricious government conduct.

In *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1516 (11th Cir. 1987), the Eleventh Circuit reversed a dismissal of plaintiff's Section 1983 claims concerning a temporary building moratorium on development finding Florida state remedies inadequate under second prong ripeness. The court interpreted *Williamson County* as articulating, without deciding, that petitioner's claim that the remedy for violation of a property owner's due process rights would include actual damages "where authorized and appropriate." 816 F.2d at 1519, quoting 473 U.S. at 197, 105 S.Ct. at 3122.

In *Greenbriar, Ltd. v. City of Alabaster,* 884 F.2d 1570, 1573 (11th Cir. 1989), the Eleventh Circuit, while denying the substantive due process claim to the denial of plaintiffs' rezoning request, did apply the first prong ripeness test to the substantive due process claim, holding that it had been satisfied. In *dicta*, the court wrote that it is "not at all clear" that first prong ripeness should apply to a substantive due process claim premised upon arbitrary governmental action. In *Eide v. Sarasota County*, 895 F.2d 1326, 1329 n. 4, the court applied both ripeness prongs in denying plaintiff's due process and equal protection claims. See also, *Anthony v. Franklin County,* 799 F.2d 681, 686, reh'g denied, 804 F.2d 681 (11th Cir. 1986).

In *Executive 10, Inc. v. Martin County,* 922 F.2d 1536 (11th Cir. 1991), the court applied *Williamson County* ripeness

prongs to dismiss plaintiffs' "due process takings claims" (at 1540), did not apply ripeness principles to "as applied equal protection claims" (at 1541), and did not apply ripeness principles to "as applied arbitrary and capricious due process claims" (at 1541).

B. There is Widespread Conflict between State Court Opinions about whether and how Ripeness Is Applied to the Resolution of Substantive and Procedural Due Process, Equal Protection and Facial Takings Claims Under 42 U.S.C. Section 1983.

Chief Justice Rehnquist observed in his opinion concurring in the judgment in *San Remo Hotel, supra,* p. __, n. 2, that various state courts in takings cases apply second-prong ripeness creating the anomaly of preventing plaintiffs from asserting their federal takings claims even in state court, citing *Breneric Assoc. v. City of Del Mar,* 69 Cal.app.4th 166, 188-89, 81 Cal.Rptr.2d 324, 338-339 (1998); *Melillo v. City of New Haven,* 249 Conn. 138, 154 n. 28, 732 A.2d 133, 138 n. 28 (1999). Similar anomalies and more inconsistency have resulted from the application of *Williamson County* ripeness prongs to procedural and substantive due process and equal protection claims under Section 1983.

The California Supreme Court has applied substantive due process analysis in the context of rent control requiring writ review of a rent control board decision denying a rent adjustment, and if granted, requiring compensation when calculating future adjustments (called a "*Kavanau* adjustment"). *Kavanaugh v. Santa Monica Rent Control Board,* 16 Cal.4th 76, 941 P.2d 851 (Cal. 1997); *Galland v. City of Clovis,* 24 Cal.4th 1003, 16 P.3d 130 (Cal. 2001). These cases implicitly apply both prongs of *Williamson County* ripeness to substantive due process analysis. In *Long Beach Equities, Inc. v. County of Ventura,* 231 Cal.App.3d

1016, 1040-1941, the state appellate court applied *Williamson County* ripeness doctrines to reject plaintiff's procedural due process, substantive due process, equal protection and Section 1983 claims. In *San Mateo County Coastal Landowners' Assn. v. County of San Mateo,* 38 Cal.App.4th 523 (Cal.App. 1995), the court observed that both ripeness prongs applied to substantive due process and equal protection claims. Similar results were reached in *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38 (Cal.App. 1990).

The Supreme Court of Hawaii has declined to apply ripeness principles to Section 1983 substantive due process claims in *Aged Hawaiians v. Hawaiian Homes Com'n,* 78 Hawaii 192, 891 P.2d 279, 290 (Haw. 1995).

In Illinois, the court in *Broughton Trucking & Material, Inc. v. County of Will,* 299 Ill.App.3d 576, 171 Ill.Dec. 299, 593 N.E.2d 1119, 1121 (Ill. 1992) applied ripeness principles in a Section 1983 action involving an allegedly unfair property assessment.

The Supreme Court of Iowa has held that second prong ripeness is not required for Section 1983 substantive due process claims in *City of Iowa City v. Hagen Elecs., Inc.*, 545 N.W.2d 530, 535 (Iowa 1996). The court later held that both substantive due process and equal protection challenges are not subject to either ripeness prong in *Blumenthal Investment Trusts v. City of West Des Moines,* 636 N.W.2d 255, 263-64.

In *Maryland Reclamation Assocs. v. Harford County,* 342 Md. 476, 492-93, 398, 677 A.2d 567 (Md. 1986), the court applied first prong ripeness to due process claims. Similarly, the court applied first prong ripeness to deny plaintiff's due process claims in *Broadcast Equities, Inc. v. Montgomery County,* 123 Md.App. 363, 400, 718 A.2d 648 (Md.App. 1998).

In *Electro-Tech, Inc. v. H.F. Campbell Co.,* 433 Mich. 57, 445 N.W.2d 61, 63, 69-77 (Mich. 1989), the Supreme Court of Michigan applied both *Williamson County* ripeness

prongs to reject not only takings, but also substantive due process claims. Justice Brinkley's spirited dissent highlights the conflict of authority in both federal and state courts over the application of ripeness principles to substantive due process claims. *Id. at* 77-95.

II. THE CALIFORNIA COURT OF APPEAL ERRED IN AFFIRMING A JUDGMENT DENYING PETITIONERS ANY ADEQUATE STATE LAW REMEDIES TO VINDICATE AND PROTECT THEIR DUE PROCESS, EQUAL PROTECTION AND JUST COMPENSATION RIGHTS UNDER THE UNITED STATES CONSTITUTION AND 42 U.S.C. SECTION 1983.

A. Petitioners' Due Process Rights In The Adjudication Of Their Section 1983 Claims Were Violated By The State Courts' Dismissal Of Their Claims Without Any Evidentiary Hearing.

In *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 l.Ed.2d 662 (1986), this Court noted that the due process clause was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" *id.* (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244, 4 L.Ed. 559 (1819)).

This Court's recent decision in *Lingle v. Chevron USA*, 545 U.S. ___ (2005), realigned the elements of facial regulatory takings, shifting a portion of takings analysis to the sphere of substantive due process when the government action advances no legitimate public purpose. In this case, the city imposed irrational land use restrictions which advance no legitimate public purpose since Petitioners' property will never be able to support viable agricultural uses.

Many courts have held that land use decisions of governmental agencies are subject to substantive due process

scrutiny and that such decisions must not be arbitrary and capricious so as to amount to an abuse of governmental power. See *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *Spence v. Zimmerman*, 873 F.2d 256, 258-62 (11th Cir. 1989); *Bello v. Walker*, 840 F.2d 1124, 1128-30 (3d Cir. 1988) (applying substantive due process to non-legislative, administrative action); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). The courts have held that a deprivation of a federally protected property interest is of constitutional stature if it is undertaken "'for an improper motive and by means that were pretextual, arbitrary and capricious, and ... without any rational basis.'" *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (quoting *Hearn v. City of Gainseville*, 688 F.2d 1328, 1332 (11th Cir., 1982); *Anthony v. Franklin County*, 799 F.2d 681, 684 (11th Cir. 1986).

Many courts have held that procedural due process requires that the states provide "'reasonable remedies to rectify a legal error by a local administrative body.'" *Cohen v. City of Philadelphia*, 736 F.2d 81, 86 (3d Cir.), cert denied, 469 U.S. 1019, 105 S.Ct. 434, 83 l.Ed.2d 360 9984) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n. 9 (lst Cir.), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982).

The state appellate court in this case erred in imposing unreasonable procedural impediments to Petitioners' Section 1983 claims in violation of long established precedents of this Court. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 502-507, 102 S.Ct. at 2560-63 (1982), *Felder v. Casey*, 487 U.S. 131, 147-48, 108 S.Ct. 2302, 2311-12, 101 L.Ed.2d 123 (1988); *Zinermon v. Burch*, 494 U.S. 113, 124-25, 110 S.Ct.

975, 982-83, 108 L.Ed.2d 123 (1990). This Court has held that exhaustion of administrative remedies in Section 1983 actions is not required. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). This rule was qualified in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), holding that the plaintiff could not bring a Section 1983 procedural due process action where post-deprivation state tort remedies provided an adequate remedy. In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), *Parratt* was substantially qualified and limited only to procedural due process claims.

It has always been clear that in adjudicating federal constitutional claims in state courts, the requirements of federal due process apply. Thus, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a state court dismissed the plaintiff's fair employment practice claims before a state agency because the agency did not convene a hearing in the required statutory time period. This Court held that the plaintiff's right to use the state statutory procedures was protected by the due process clause when the denial was pursuant to the "established state procedure." Here, the "established state procedure" are the vague and misapplied provisions of California Code of Civil Procedures Section 1094, which contains no meaningful procedural safeguards for the litigation of federal constitutional and statutory claims by the California state courts.

Justice Blackmun wrote, at 455 U.S. 429-430, that this "Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempt to redress grievances." Citing *Societe Internaionale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), the Court restated the principal that the "property" component of the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts,

even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." *Id.* at 209, 78 S.Ct. at 1094. Citing also *Hammond Packing Co., v. Arkansas*, 212 U.S. 322, 349-351, 29 S.Ct. 370, 379-380, 53 L.Ed. 530 (1897) (power to enter default judgment); *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (same); *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876) (same). Cf. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, k41 L.Ed. 935 (1974).

Justice Blackmun referred to cases involving the denial of the right of access to the courts as providing an analogous method of analysis, including this Court's decision in *Boddie v. Connecticut,* 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed. 113 (1971) (the states may not deny potential litigants use of established adjudicatory procedures, when such action would be "the equivalent of denying them an opportunity to be heard upon their claims right[s]." (455 U.S. at 429-430, and n. 5.) In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court's analysis guaranteed "to all individuals a meaningful opportunity to be heard." Justice Blackmun's analysis required that once the state makes access to the courts an entitlement or a necessity (as the California Supreme Court had done in *Hensler v. City of Glendale, supra,* in the adjudication of property rights claims), "the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." 455 U.S. at 430. Obviously, there is no overriding state interest in the dismissal of constitutional claims without any form of evidentiary hearing.

B. The Adjudication Of Substantive Due Process And Facial Challenges Is Well Established And Requires A Fair Factual Hearing by State Trial Courts.

In *Lingle v. Chevron, U.S.A.* (2005)____U.S.___, this Court ruled that facial challenges to regulations based the failure to advance any legitimate public purpose are more appropriately analyzed on substantive due process bases. The state appellate court in this case avoided any discussion of either facial challenges under the takings clause or on substantive due process grounds.

The state appellate court below incorrectly opined that, "Appellants blur the distinction between the enactment of a GPA any effect it might ultimately have upon an owners use of the property." (App. C, 8a.) The state court then relies upon *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 118 (1973), and *Dale v. City of Mountain View,* 55 Cal.App.3d 101 (1976). These cases predate this Court's many subsequent decisions, including *Penn Cent. Transp. Co v City of New York,* 438 U.S. 104, 98 S.Ct 2646 (1978); *First English Evangelical Lutheran Church of Glendale,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Nollan v. California Coastal Commission* 483 U.S. 815, 107 S.Ct, 3141, 97 L.Ed2d 677 (1987); *Dolan v. Tigard* 512 U.S. 374, 1145 S.Ct. 2309, 129 L.Ed.2d 204 (1994); *Lingle v Chevron U.S.A.* Inc., supra.; *Village of Willowbrook v. Olech,* 528 U.S. 562, 145 L.Ed. 2d 1060 (2000).

Moreover, the state appellate court's opinion ignores one of the most fundamental distinctions in takings and substantive due process jurisprudence, almost as though it does not exist; that is, the distinction between an "as applied" challenge and a "facial" challenge whether on takings or substantive due process grounds. *Penn Central Transp. Co. v. New York City*, supra, and *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* supra, are as applied challenges. *Nectow, supra*, and *Agins vs. City of Tiberon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), are facial challenges to the enactment of an ordinance. Ignoring the seachange in property rights jurisprudence since 1987, renders the balance

of the state appellate court's analysis fundamentally misplaced and outside of any current jurisprudential consensus.

This Court wrote in *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928) that:

> "The governmental power to interfere by zoning regulations with the general right of the landowners by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.' [citations omitted] Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. [citations omitted]"

The state trial and appellate courts below fundamentally misunderstand the judicial function in either a substantive due process, equal protection, or takings facial challenge. While it is not often that the courts exercise that power, the process throughout the country is basically the same, and it must be based upon some weighing of evidence demonstrating the arbitrary, capricious, or unreasonable nature of the government action.

In *Corrigan v. City of Scottsdale* (1986) 149 Ariz. 553, 720 P.2d 528 (App.1985), aff'd in part, vacated in part, 149 Ariz. 538, 720 P.2d 513, the Arizona Supreme Court invalidated as an unconstitutional exercise of the police power a zoning ordinance creating a conservation area. Under the ordinance, land within the conservation area was to remain as "permanent natural open space."

In *Morris Cty. Land v. Parsippany-Troy Hills* (1963) 40 N.J. 539, 193 A.2d 232, the New Jersey Supreme Court stated the accepted rule that a constitutional violation occurs, "when the only permitted uses are those [to] which the

property is not adapted or which are economically infeasible." (Id. at 557)

In A. M. G. Associates v. Springfield (1974) 65 N.J. 101, 319 A.2d 705, the court invalidated a zoning ordinance where the allowed use of the land, "by reason of inability to meet the requirements of the zone in which it is situate, is practically unusable, yet remains subject to the burden of taxation." (Id. at 111-12)

In *Home Builders League of So. Jersey, Inc. v. Berlin* (1979) 81 N.J. 127, 405 A.2d 381, the court held that, "there are constitutional constraints which must be observed. Zoning, reflecting as it does the exercise of the police power, is subject to due process requirements. Arbitrary or unreasonable zoning ordinances cannot stand. The purposes sought to be accomplished must justify the restrictions placed upon the use of one's land. The means used to obtain the ends must be reasonably related to those ends." (Id. at 137.)

In *Katobimar Realty Co. v. Webster* (1955) 20 N.J. 114, 118 A.2d 824, the court held that: "Use restrictions upon real property must find their justification in some aspect of a police power, reasonably exerted for the public welfare ... But it is basic to zoning, as with every exercise of the police power, that it be contained by the rule of reason; constitutional due process and equal protection ordain that the exertion of the authority shall not go beyond the public need; there cannot be unnecessary and excessive restrictions upon the use of private property or the pursuit of useful activities; a substantial intrusion upon the right infringes essential individual [445 A.2d 59] liberties immune to legislative interference. The restrictions may be so unreasonable as to be confiscatory, and the regulation then transgresses the organic law as arbitrary and oppressive." "The constitutional principles of due process and equal protection demand that the exercise of the power be void of unreason and arbitrariness, and the

means selected for the fulfillment of the policy bear a real and substantial relation to that end."

In *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 213, 690 N.E.2d 510, quoting *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303, the Supreme Court of Ohio held that a landowner can challenge the constitutionality of a zoning ordinance in two ways. "First, a landowner can allege that a zoning ordinance is unconstitutional as applied to a particular parcel of land. *Goldberg,* 81 Ohio St.3d at 213, 690 N.E.2d 510. Second, a landowner may allege that a zoning ordinance as applied to property constitutes a "taking" in violation of the Fifth Amendment to the United States Constitution, entitling the owner to compensation. Id." Substantive due process, as opposed to procedural due process, addresses the 'essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible.' " (*Amsden v. Moran* 904 F.2d 748, 753 (1st Cir.1990), cert. denied, 498 U.S. 1041, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991)). A regulation that takes property violates the substantive due process clause if it is arbitrary, discriminatory, or irrelevant to a legislative policy. *Tenoco Oil Co. v. Department of Consumer Affairs* 876 F.2d 1013, 1021 (1st Cir.1989). Furthermore, as to substantive due process claims, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Zinermon*, 494 U.S. at 125, 110 S.Ct. at 983, 108 L.Ed.2d at 114.

Board of County Supervisors of Fairfax County v. Carper (1959) 200 Va. 653, 107 S.E.2d 390, held invalid a county zoning law fixing a two acre minimum lot size in the western two-thirds of the county.

In *National Land and Investment Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1966), the court struck down an ordinance that placed thirty percent of the Township in the most restrictive zone, with a minimum lot area of four acres. The court wrote that: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid." 419 Pa. at 532, 215 A.2d at 612.

In *L.A. Ray Realty v. Town Council of the Town of Cumberland* (R.I., 1977) 698 A.2d 202, 212-214, the Supreme Court of Rhode Island invalidated as violating substantive due process a two-acre minimum zoning ordnance amendment based upon a factual inquiry demonstrating that "plaintiffs were deprived of their fundamental constitutionally protected property rights because of the 'egregiously unacceptable' and 'outrageous actions' of town officials." Id. at211.

In *Zaagman, Inc. v. Kentwood* (Mich. 1979) 277 N.W.2d 475, 406 Mich 137, the Supreme Court of Michigan held that a two acre parcel size rezoning was "unreasonable, arbitrary and confiscatory" "thereby rendering the disputed...zoning designation constitutionally invalid and void." The process followed by the court involved an analysis of development costs, returns, and application by mere enactment of the restrictions to the plaintiffs' property. Id.at 480.

In *Kasparek v. Johnhson County Board of Health* (Iowa,1980) 288 N.W.2d 511, the Iowa Supreme Court held "unconstitutional and void and ineffective" a minimum parcel size of five acres, affirming the principal that a "zoning of land (for a particular purpose) is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for (that purpose)." Id. at 516, quoting from 8 E. McQuillin, *The Law of Municipal Corporations* § 25.45, at 118-19 (3d ed. 1965).) Accord,

Petersen v. City of Decorah, 259 N.W.2d 553, 554-55 (Iowa Ct.App.1977). See generally 8 E. McQuillin, *The Law of Municipal Corporations* § 25.45, at 111 (3d ed. rev. 1976) ("Even though a zoning ordinance may be valid in its general aspects, yet in its application to a particular piece of property it may be so clearly arbitrary and unreasonable as to result in confiscation in violation of the constitutional rights of the owner.").

The resolution of federal substantive and procedural due process, equal protection, and facial takings challenges requires more than summary dismissal through an *a priori* judicial intuition of factual questions. Due process requires a fair opportunity to be heard and to present evidence. The application of California Code of Civil Procedure Section 1094 to Petitioners' federal constitutional and statutory claims violates fundamental principles of due process guaranteed by the Constitution and laws of the United States.

CONCLUSION

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

S141418

[Filed March 29, 2006]

BRUCE VANDERVEEN, et al.,
Plaintiffs and Appellants,

v.

CITY OF ARROYO GRANDE et al.,
Defendants and Respondents.

On Appeal From
Second Appellate District, Division Six
No. B178611

Petition for review DENIED.

/s/
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 6

B178611

[Filed February 7, 2006]

VANDERVEEN, BRUCE Plaintiff-Appellants,	)
v.	)
CITY OF ARROYO GRANDE Defendants-Respondents	)

On Appeal From
San Luis Obispo County
No. CV31144

THE COURT:

Petition for rehearing is denied.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION SIX

B178611

[Filed January 9, 2006]

BRUCE VANDERVEEN et al.,
Plaintiffs and Appellants,

v.

CITY OF ARROYO GRANDE et al.,
Defendants and Respondents.

On Appeal From
San Luis Obispo County
No. CV 031144

JUDGES: COFFEE, J.; YEGAN, Acting P.J., PERREN, J. concurred.

OPINION

Appellants Bruce and Mary Vanderveen's property in the City of Arroyo Grande was designated as agricultural for 32 years. In 2001, the city amended its general plan, causing

appellants' parcel to be designated for residential use. In 2003 the general plan was amended again, resulting in appellants' property being redesignated as "agricultural." Appellants challenge the 2003 amendment to the general plan, alleging that they are entitled to money damages and declaratory relief since they are unable to develop their property. We disagree and affirm.

FACTS

Adoption of General Plan Amendment (GPA)

Appellants own a 4.9 acre parcel of property in the City of Arroyo Grande. The property had been zoned as agricultural since the city adopted its first general plan. On October 9, 2001, the city amended its general plan (2001 GPA) and redesignated four parcels (including appellants' parcel) as "residential and mixed use/planned unit development." The amendment was controversial and generated opposition from citizens wishing to conserve agricultural land.

On December 3, 2002, a newly constituted city council began to consider ways to conserve agricultural land within the city. On December 10, it approved a staff recommendation to enact a 180-day moratorium on the acceptance of applications to develop agricultural land. During this time, city staff was to prepare a report on the effect of agricultural conversions. The city council passed the ordinance on January 14, 2003, effective on February 14, 2003.

Following the completion of the study, the planning commission 1) held a series of public workshops and hearings to review the report; 2) received public testimony; and 3)

recommended that the city amend the general plan to redesignate the four parcels as agricultural.

On September 23, 2003, the city council approved the amended general plan (2003 GPA), returning the parcels to their agricultural designation. The amendment increased the maximum number of acres that a developer might be required to protect if he sought to convert prime farmland to an urban use.

During the time between the city's adoption of the 2001 GPA and the 2003 GPA, appellants attempted to subdivide their parcel for residential development. They lodged a tentative tract map with the city on approximately November 8, 2002. On December 10, the city informed appellants by letter that they would need to submit a revised application and include additional material. The following day, appellants submitted a revised application. On January 9, 2003, the city informed appellants that their application was still incomplete. Appellants submitted additional materials and, on February 11, the city notified them that their application still required additional data. On February 18, the city advised appellants by letter that their application was suspended for 180 days due to the moratorium. The 2003 GPA was adopted on September, 23, 2003.

Lawsuit Against the City

On November, 26, 2003, appellants filed a combined petition for writ of mandate and a complaint for equitable relief and money damages. They brought their action against respondents the City of Arroyo Grande, its city council, planning commission and planning department (collectively "City"). Appellants contended that the City's actions in amending the general plan were "arbitrary, capricious, and

advance no legitimate public purpose, because [appellants'] property does not contain prime agricultural lands, has never been irrigated, has no viable agricultural use, and the designation thereof is wholly devoid of any rational and legitimate public purpose."

In their first and second causes of action, appellants requested the court to issue a writ pursuant to Code of Civil Procedure section 1085, or section 1094.5, or, in the alternative, for injunctive and declaratory relief. They alleged that the City had "abused its discretion" in adopting the 2003 GPA and had acted "unreasonably, illegally, and [in] violation of its statutory duties, in refusing to process [appellants'] residential housing Project." They further alleged that the City had failed to comply with the "housing element" in its general plan, as mandated by the Government Code. Appellants requested that the court order the City to set aside the 2003 GPA and direct it to process their project application.

In their third through eighth causes of action, appellants alleged violations of their rights to procedural and substantive due process, equal protection and civil rights. In their ninth and tenth causes of action, they alleged inverse condemnation and claimed their property was taken without just compensation. The City filed an answer and later moved for denial of appellants' request for a writ of mandate.

The trial court denied appellants' writ petition. It issued an extensive written "ruling on petitioners' motion for interlocutory judgment and respondents' motion for denial of writ." Judgment was entered in favor of the City and against appellants.

DISCUSSION

Traditional Mandamus

A writ of mandate is a procedural vehicle intended to "compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) The adoption of a general plan amendment is a legislative act. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110, 118, 109 Cal. Rptr. 799 (*Selby*).) Actions taken by an administrative agency in its legislative capacity are reviewable under Code of Civil Procedure section 1085. (*Karlson v. City of Camarillo* (1980) 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260.)

When reviewing the denial of a petition for writ of mandamus, we review questions of law de novo. (*Fry v. Saenz* (2002) 98 Cal. App. 4th 256, 262.) The trial court's factual findings are reviewed under the substantial evidence standard. (*Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal. App. 4th 338, 347.) Appellants bear the burden of proving that a land-use regulation is arbitrary or irrational. (*San Mateo County Coastal Landowners' Association v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 542.)

The trial court found that there was strong evidence supporting a return to the agricultural designation as outlined in the 2003 GPA. As a result of the study, evidence was offered that the four parcels contain prime soils suitable for agricultural development and use. The court noted that the property was designated as agricultural for 32 years before enactment of the 2001 GPA. Although there was a two-year

window in which the designation was changed to residential, the physical characteristics of the property remained the same.

The report commissioned by the City indicated that the property contains either class I or class II soils, making it suitable for agricultural uses. The report included public testimony in favor of maintaining agricultural land, the historical importance of agriculture to the City, and the economic benefits of increased agricultural uses. The trial court noted that a memo to the city council was prepared analyzing the agricultural policies in the City's general plan. Appellants' property was identified as being well-suited to agricultural use but inadequate for residential use. We conclude there was substantial evidence to support the City's decision to approve the 2003 GPA.

Declaratory Relief and Inverse Condemnation

Appellants alleged causes of action for the regulatory and physical taking of their property. They requested a judicial declaration establishing their rights in the parcel. "Since the wisdom of the plan is within the legislative and not the judicial sphere, a landowner may not maintain an action in declaratory relief to probe the merits of the plan absent allegation of a defect in the proceedings leading to its enactment." (*Selby*, *supra*, 10 Cal. 3d at p. 118.)

Appellants blur the distinction between the enactment of a GPA and the effect it might ultimately have upon an owner's use of the property. The court in *Selby*, rejecting claims for declaratory relief and inverse condemnation, stated that "if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the

validity and potential effect of the plan upon his land, the courts of this state would be inundated with litigation." (*Selby, supra*, 10 Cal. 3d at pp. 120-121.)

In *Dale v. City of Mountain View* (1976) 55 Cal. App. 3d 101, 127 Cal. Rptr. 520, the city adopted an amendment to its general plan restricting use of certain parcels to open space. A property owner filed an action against the city for declaratory relief and inverse condemnation challenging the amendment. The trial court sustained the city's demurrer without leave to amend. The appellate court concluded that, if the city took future action that affected the owner's use of his property, the validity of the action could be challenged at that time. (*Id.* at p. 107.)

Here, as the trial court noted in its ruling, appellants abandoned their application for a development permit and chose instead to challenge the 2003 GPA. The City has yet to make a determination as to the acceptable uses of appellants' property. For this reason, their claim is not ripe for review. Appellants' condemnation claim is equally without merit. A city's adoption of a general plan is not a "taking" that would support a cause of action for inverse condemnation. (*Selby, supra,* 10 Cal. 3d at pp. 119-120.)

Housing Element

A local agency's general plan must contain a housing element, which requires a city to periodically review the current housing needs of the community. (Gov. Code, §§ 65302, subd. (c), 65580 et seq.) Under Government Code section 65863, subdivision (a), a city must ensure that it has sufficient sites to accommodate its regional housing needs. In certain situations, a city may reduce the "residential density" of a parcel. However, it must ensure that there are sufficient

available sites so there is no loss of "residential unit capacity." (*Id.*, subd. (c).)

Shortly after the 2003 GPA was enacted, the state notified the City that its draft housing element did not comply with state law because it failed to identify a sufficient inventory of sites for its housing needs. Appellants claimed that, due to the City's failure to comply with these statutory requirements, the entire 2003 GPA should be set aside.[1] Appellants provide no support for their argument that a defect in the housing element should somehow invalidate the 2003 GPA. Furthermore, appellants' contention concerning the City's residential housing needs has no bearing on their property, which is now designated as agricultural. Nor have appellants claimed that there is a direct relationship between their agricultural designation and the City's available housing inventory to merit consideration of such an argument.

Appellants have not alleged any defect in the proceedings leading up to the adoption of the amendment and the record does not support their claim that the City acted arbitrarily or capriciously or that its decision was unsupported by the evidence. Appellants have not demonstrated that the City has engaged in conduct depriving them of their constitutional rights, thus we need not address those claims.

The judgment is affirmed. Costs on appeal are awarded to respondents.

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[1] We grant the City's request for judicial notice of a June 22, 2005, letter from the Department of Housing and Community Development, indicating that the City's housing element is now in compliance with the statutory requirements.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN LUIS OBISPO

No. CV031144

[Filed September 22, 2004]

BRUCE VANDERVEEN and MARY VANDERVEEN, Petitioners and Plaintiffs,	)
v.	)
CITY OF ARROYO GRANDE, a municipal corporation; CITY COUNCIL OF THE CITY OF ARROYO GRANDE; PLANNING COMMISSION OF THE CITY OF ARROYO GRANDE; PLANNING DEPARTMENT OF THE CITY OF ARROYO GRANDE; and DOES 1 through 100, Respondents and Defendants.	)

ASSIGNED FOR ALL PURPOSES TO THE HONORABLE MARTIN TANGERMAN

JUDGMENT

The motion for Interlocutory Judgment filed by Petitioners and Plaintiffs BRUCE VANDERVEEN and MARY VANDERVEEN ("Petitioners"), and the Motion for Denial of Writ filed by Respondents and Defendants CITY OF ARROYO GRANDE, CITY COUNCIL OF THE CITY OF ARROYO GRANDE, PLANNING COMMISSION OF THE CITY OF ARROYO GRANDE, and PLANNING DEPARTMENT OF THE CITY OF ARROYO GRANDE ("Respondents"), came on for hearing on July 19, 2004, in the above-captioned court, the Honorable Martin Tangerman presiding. William S. Walter appeared on behalf of Petitioners, Joel D. Kuperberg and John A. Ramirez of Rutan & Tucker, LLP appeared on behalf of Respondents.

After full consideration of the Record of Proceedings, and authorities submitted by counsel, and the oral argument made by counsel at the time of the hearing, this Court has DENIED Petitioners' Motion for Interlocutory Judgment, GRANTED Respondents' Motion for Denial of Writ, and ORDERED that Judgment in this action be entered in favor of Respondents, and against Petitioners, on all causes of action in Petitioners' Petition and Complaint, as set forth in this Court's "Ruling on Petitioners' Motion for Interlocutory Judgment and Respondents' Motion for Denial of Writ" ("Ruling"), signed and filed on August 24, 2004.

Now, therefore, and for the reasons set forth in this Court's Ruling, and all the reasons set forth in Respondents' Motion for Denial of Writ,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment in this action is hereby entered in favor of Respondents and Defendants CITY OF ARROYO GRANDE, CITY COUNCIL OF THE CITY OF ARROYO GRANDE, PLANNING COMMISSION OF THE CITY OF ARROYO GRANDE, and PLANNING DEPARTMENT OF THE CITY OF ARROYO GRANDE, and against Petitioners and Plaintiffs BRUCE VANDERVEEN and MARY VANDERVEEN, on all causes of action in Petitioners' Petition and Complaint. Petitioners shall take nothing in this action from Respondents, and Respondents shall recover from Petitioners their costs of suit incurred herein.

Dated: 9/22/04 /s/

Hon. Martin Tangerman
San Luis Obispo Superior Court Judge

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

No. CV031144

[Filed August 24, 2004]

BRUCE VANDERVEEN AND	)
MARY VANDERVEEN,	)
PETITIONERS/PLAINTIFFS,	)
	)
v.	)
	)
CITY OF ARROYO GRANDE, et al,	)
RESPONDENTS/DEFENDANTS.	)
	)

RULING ON PETITIONERS' MOTION FOR INTERLOCUTORY JUDGMENT AND RESPONDENTS' MOTION FOR DENIAL OF WRIT

INTRODUCTION

This action was filed on November 26, 2003, as a combined verified petition for writ of mandate and complaint for equitable relief and money damages. This petition/complaint was precipitated by a City Council resolution passed September 23, 2003, adopting an amendment to the City's General Plan that, inter alia, changed

the land use designation of four parcels of real property, including Petitioners' parcel, which a previous City Council had made available for residential development.

SUMMARY OF RELEVANT EVENTS

On October 9, 2001, the City Council adopted a general plan amendment ("GPA") which changed the designated use of certain properties (including the 4.9 acre parcel owned by Petitioners) from "Agricultural" to "Residential and Mixed Use/PUD". [Record of Proceedings Vol. 3, page 891 ("RP 3:891")].

Just as immediately, the Citizen's Committee for the Conservation of Local Agriculture began circulating a petition for a referendum to challenge two specific portions of the GPA: (1) the change in the designated use of the property and three other parcels from Agricultural to Residential and Mixed Use/PUD, and (2) the approval of certain language in Agricultural Objective 1 which the Citizen's Committee felt downgraded the protection of agricultural land from urban development.

Ultimately, the Citizen's Committee was unsuccessful in pursuing the referendum. However, at the next general election, Joe Costello was elected to the City Council. Costello had expressed a willingness to make the preservation of Agricultural land a high priority. On December 3, 2002 the newly constituted City Council directed its Community Development Department to develop alternative methods to prevent prime agricultural land from being converted to urban uses. [RP 5:1678].

On December 10, 2002, the City Council approved a staff recommendation to introduce an ordinance suspending

applications for development of any prime farmland soils for a 180 day period, and directing its staff to prepare a study considering all ramifications of allowing the development of private farmland soils. [RP 5:1708].

On January 14, 2003, the City Council passed Ordinance No. 536. Ordinance No. 536 created a moratorium, effective February 14, 2003, on acceptance of land use applications to develop parcels containing prime farmland soils. [RP 6:1754].

After consideration of various studies and following public hearings, the City Council on September 23, 2003, by Resolution No. 3711, approved GPA 03-002. [RP 9:2977-80]. GPA 03-002 changed the land use category assigned to four parcels, including Petitioners' parcel, back to Agricultural and amended Agricultural, Conservation and Open Space Element Implementation Policy AG 1-4.2. This amendment increased the maximum number of agricultural acres a landowner seeking to convert prime farmland soils to an urban use might have to permanently protect as mitigation for the requested conversion.

Meanwhile, Petitioners attempted to develop their parcel during the period between adoption of the 2001 GPA and adoption of the 2003 GPA. Toward that end, they lodged Tentative Tract Map No. 2510 with the City's Community Development Department on or about November 8, 2002. On December 4, 2002, Petitioners' representative sent a letter to the City confirming that "After discussions with staff, it was decided to use the Planned Unit Development route to obtain approval of the project." [RP 5:1669].

By letter dated December 10, 2002, Rob Strong, the City's Community Development Director, advised the Petitioners that in order to "receive the application for

determination of completeness," they would have to submit a revised application including "a Development Code Amendment and Planned Unit Development with applicable submittal materials". [RP 5:1709]. On December 11, 2002, the Petitioners submitted a revised application. [RP 5:1710].

The Community Development Department determined that the Petitioners' revised application was incomplete. By letter dated January 9, 2003, Strong advised the Petitioners of the additional information or changes to their application necessary to process the same, including a materials and colors board. [RP 6:1723-24]. On January 14, 2003, copies of the site plan, preliminary floor plans and elevations, preliminary landscape plans, and a statistical summary and sectional drawings were delivered to the City. [RP 6:1745].

However, the community Development Department determined on February 11, 2003, that the Petitioners' revised application was still incomplete because the Petitioners had not submitted a sample board illustrating proposed building materials and colors. Strong so notified the Petitioners by letter of that same date. [RP 1758].

On February 18, 2003, Strong advised the Petitioners that he had still not received the required colors and material board. Strong's letter also advised the Petitioners that their application was suspended by Ordinance No. 536 moratorium for at least 180 days because their property contained "prime farmland soils" as defined by Ag Objectives and Policies, Ag 1-1.1 of the 2001 GPA. [RP 6:1761].

On September 3, 2003, Strong sent a letter to the Petitioners confirming that the moratorium had ended; acknowledging receipt (on or after February 18, 2003) of the required colors and material board; and informing them that

their property was designated low-density residential (which enabled one dwelling unit per acre). Because the property was less than five acres, there were some issues that had to be clarified if Petitioners intended to add four units to the existing house on the property. Strong also informed Petitioners that their earliest opportunity to meet the pre-application requirement of the City's Development Code would be the next Staff Advisory Committee meeting, on September 24, 2003. Strong also warned Petitioners that on July 22, 2003, the City Council had initiated consideration of a GPA that could re-designate their property as Agricultural, and informing them that the city "may apply any ordinances, policies or standards enacted or instituted as result of the public hearings and related proceedings to our Tentative Parcel Map application, pursuant to Government Code Section 66474.2." [RP 8:2749-50].

On September 23, 2003, the City adopted GPA 03-002.

While all of the above-described events were transpiring, the City was working on an update of its Housing Element to meet state imposed mandates and to pursue local housing objectives covering the 2003-2008 planning period.

On August 22, 2003, the City submitted a draft Housing Element to the State Department of Housing and Community Development ("Department"). On or about October 21, 2003, the Department notified the City that its draft Housing Element was inadequate because, inter alia, it (1) failed to identify adequate sites for units affordable to lower and moderate income persons, and (2) failed to adequately analyze potential government constraints to the maintenance, improvement and development of housing.

On or about November 25, 2003, after making changes, the City Council adopted a Housing Element. On December 17, 2003, the City forwarded a copy of the Housing Element to the Department. [RP 10:3642-51]. On or about March 18, 2004, the Department informed the City that its Housing Element did not comply with state law, because, inter alia, it still did not identify sufficient sites to accommodate the City's share of the regional housing need for lower-income persons and failed to analyze the impact of GPA 03-002. [RP 10:3652-57].

FIRST CAUSE OF ACTION
WRIT OF MANDATE

Petitioners claim that they are entitled to a writ of mandate pursuant to Code of Civil Procedure Section 1085 or, in the alternative, Section 1094.5. They seek to set aside GPA 03-002 because it was enacted in an arbitrary, capricious, and unreasonable manner. Petitioners also seek an order directing the City to process and approve their development application.

The City argues that enacting amendments to a general plan is a legislative act and that, therefore, the appropriate standard of review is under CCP Section 1085. The City is correct on this point. As set forth in *Selby Realty Co. vs. City of San Buenaventura* (1973) 10 Cal. 3rd 110, 118:

> "The adoption of a general plan is a legislative act. Since the wisdom of the plan is within the legislative and not the judicial sphere, a landowner may not maintain an action in declaratory relief to probe the merits of the plan absent allegation of a defect in the proceedings leading to its enactment".

Further, as stated in *Karlson vs. City of Camarillo* (1980) 100 Cal. App. 3rd 789, 803-804:

> "A difference of opinion, no matter how strongly presented, does not warrant a rejection of the City's action where it has been demonstrated that the City was presented with opposing viewpoints, considered them extensively and on the basis of evidence elected one alternative rather than another. This cannot be the basis of a charge that the City acted arbitrarily or capriciously or without evidentiary support. Under the circumstances presented here no basis exists for judicial interference".

Under CCP section 1085, Petitioners bear the burden of proof that GPA 03-002 is arbitrary or irrational. *San Mateo County Coastal Landowners' Association vs. County of San Mateo* (1995) 38 Cal. App. 4th 523, 542. The evidence in this case, when viewed as a whole, demonstrates that the City Council properly considered the merits of preserving agricultural land within city boundaries. Competing evidence and arguments were advanced on the issue of whether the subject four parcels contain prime soils suitable for agricultural development and use. Much of the evidence supported a return to the previously existing Agricultural designation. Among other things, the property was designated as Agricultural under the City's zoning enactments for 32 years before it was briefly designated as Residential by virtue of the 2001 GPA. [RP 2977-2983; RP 3:729-732, 771]. During the intervening two-year period, the characteristics which qualified the property for an Agricultural designation did not change. [RP 9:2872].

In addition, the Agricultural Lands Report commissioned by the city demonstrated that the property contains either

Class I or Class II soils, thereby making it suitable for agricultural uses. [RP 8:2565, 2589]. The Report also contained detailed discussions of (1) public testimony supporting a decision to maintain agricultural lands, (2) the historical importance of agriculture in the City, (3) the economic benefits that would result from increased agricultural uses, and (4) the specific benefits inherent in the agricultural use of "small lots" (i.e., those less than 5 acres in size). [RP 8:2557-2604].

Furthermore, the September 23, 2003, Memo to Council analyzed the agricultural policies in the City's General Plan and included a specific reference to Petitioners' property as being well-suited to agricultural use. [RP 9:2872]. The Memo also discussed the existing infrastructure of the parcels under consideration, specifically stating that Petitioners' property was inadequate for residential use. [RP 9:2875].

Finally, the designation of Petitioners' property by general plan amendment did not end Petitioners' right to pursue approval of their application for development. As held in *Karlson vs. City of Camarillo*, supra at pages 798-799:

> "The case of *Dale vs. City of Mountain View* 55 Cal. App. 3rd 101 [127 Cal. Rptr. 520] is dispositive of the question of scope of review. In that case the court was presented with a declaratory relief cause of action attempting to challenge an amendment to a general plan which had the effect of restricting the plaintiff's use of its property to open space, and thus it was alleged that this precluded its development for residential use. There was no allegation of procedural defect in the adoption of the amendment. The appellate court held that a demurrer to the cause of action for review was properly sustained without leave

> to amend... The rationale was that no action had been taken with respect to the plaintiff except that which affected all citizens. Because the potential effect of the plan is tentative and subject to change and dependent upon unpredictable future events, these circumstances did not admit of definitive and conclusive judicial relief. The court noted that if the county took future action in such manner as actually to affect the plaintiff's free use of his property, the validity of such action could be challenged at that time."

Next, to the extent that Petitioners allege that the 2003 GPA is unconstitutional on its face, their claim must fail because "it bears 'a substantial relationship to the public welfare...' and inflicts no irreparable injury on the landowner." *Long Beach Equities, Inc. vs. County of Ventura* (1991) 231 Cal. App. 3d 1016, 1030. Promotion of agricultural uses is a legitimate government purpose, and is designed to protect the public weal. *See Long Beach Equities, Inc.*, supra (protection of open space). And, as noted in that case, "[t]his is true even where a substantial diminution in value of the property is alleged. (Citation)." Id at p. 1030.

Finally, to the extent that Petitioners allege a regulatory taking, their claim must fail because it is not yet ripe. Petitioners abandoned their application for a development permit, and the city has not yet had an opportunity to make a final determination of the uses that Petitioners may make of their property. *Id.*

SECOND CAUSE OF ACTION

WRIT OF MANDATE

Petitioners' second cause of action involves the interplay between GPA 03-002 and those statutes set forth in the Government Code pertaining to the required contents of a Housing Element. Petitioners argue that on September 23, 2003, when the City adopted GPA 03-002, the City did not have a state-approved Housing Element in effect for the 2003-2008 planning term.[1] Accordingly, Petitioners seek a writ of mandate pursuant to CCP section 1085 or, in the alternative, CCP section 1094.5, or in the further alternative, a preliminary and permanent injunction, directing the City to set aside GPA 03-002. For the reasons set forth above, the Court finds that CCP section 1085 applies.

To the extent that the second cause of action alleges that the City's actions were arbitrary, capricious or irrational, and should therefore be set aside, these claims are redundant to those made in the first cause of action, and the same result follows.

Further, Petitioners' argument is inconsistent with the plain language of Government Code Section 65863(c).[2] As

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[1] On or about October 21, 2003, the State notified the City that its draft Housing Element did not comply with state law, based in part on a failure to identify a sufficient inventory of sites available for housing and the failure to adequately analyze potential government constraints upon its ability to meet its fair share of the reasonable housing needs.

[2] That section precludes reduction in residential density for any parcel which would result in the remaining sites in the City's

pointed out by the City, the Housing Element that was in effect when the 2003 GFA was adopted designated Petitioners' property as agricultural, not residential, so that there was no reduction in the housing inventory referenced in the City's Housing Element as a result of enactment of the 2003 GPA.

Under the circumstances, where there is no direct relationship between the shortage of available housing and that change in zoning, the requested relief is not appropriate. *Shea Homes L.P. vs. County of Alameda* (2003) 110 Cal. App. 4th 1246. Otherwise, acceptance of Petitioners' argument (that all down zoning is prohibited if the local Housing Element does not provide for a jurisdiction's "fair share" of housing) would require violations "of the whole statutory scheme: '[T]o protect California's land resource, to insure its preservation and ... improve the quality of life in California'" *Id.* at p. 1262.

THIRD CAUSE OF ACTION

DECLARATORY RELIEF

Petitioners request a declaration that GPA 03-002 is illegal, arbitrary, capricious and unconstitutional. However, as held in *Selby Realty Co. vs. City of San Buenaventura*, *supra*, at page 118:

> "The adoption of a general plan is a legislative act. Since the wisdom of the plan is within the legislative and not the judicial sphere, a landowner may not

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Housing Element not being adequate to accommodate its share of its original housing needs, unless certain findings are made.

maintain an action in declaratory relief to probe the merits of the plan absent allegation of a defect in the proceedings leading to its enactment."

See also Dale vs. City of Mountain View, (1976) 55 Cal. App. 3rd 101, 108.

FOURTH THROUGH EIGHTH CAUSES OF ACTION

PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

As noted above, to the extent that Petitioners complain of violations of due process or equal protection, their claims must fail because they are not ripe. The evidence establishes that Petitioners abandoned their application for a development permit, and the City has not yet had an opportunity to make a final determination of the use that Petitioners may make of their property. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates vs. County of Yola* (1986) 477 U.S. 340, 348. Before bringing this action, Petitioners must show some "final" adverse action by the City as regards the ultimate permissive uses for their property. *Long Beach Equities, Inc. vs. County of Ventura*, supra.

NINTH AND TENTH CAUSES OF ACTION

INVERSE CONDEMNATION AND JUST COMPENSATION

Petitioners allege, in their ninth cause of action, a cause of action for inverse condemnation. However, as noted above, "[t]he mere enactment of a general plan cannot be deemed a

taking." *Selby Realty Company vs. City of San Buenaventura,* supra, at p. 127. And, once again, to the extent that Petitioners allege a "regulatory" taking, these claims must fail because they are not ripe. *See also Hensler vs. City of Glendale* (1994) 8 Cal. 4th 1. Because no unlawful taking has been shown, there is no basis for payment on just compensation.

ELEVENTH CAUSE OF ACTION

42 U.S.C. Section 1983

Petitioners' eleventh cause of action claims a violation of Title 42, section 1983. However, it is well established that section 1983 is not a source of substantive rights; those must be found elsewhere. *Albright vs. Oliver* (1994) 510 U.S. 266. Instead, section 1983 creates a private right of action, and a possible remedy, whenever anyone 'acting under color of state law deprives a person of federal rights, privileges, or immunities. *See Baker vs. McCollan* (1979) 443 U.S. 137, 144, Note 3. For all those reasons set forth above, however, Petitioners have failed to establish such a violation.

RESPONDENTS' ACTIONS ARE NOT UNCONSTITUTIONAL UNDER THE NOLLAN/DOLLAN STANDARDS

Petitioners claim that the amendment to the Agricultural, Conservation and Open Space Element Implementation Policy

AG 1-4.2[3] is unconstitutional because as amended, it is inconsistent with the rough proportionality standards articulated in *Nollan vs. California Coastal Commission* (1987) 483 U.S. 825, and *Dolan vs. City of Tigard* (1994) 512 U.S. 374. There are, however, two problems with this claim.

First, both the *Nollan* and the *Dolan* cases examined conditions extracted from the property owners in connection with the granting of permits allowing for a particular use on their property. In *Nollan*, a public beach access easement was exacted as a condition of allowing the Nollans to replace a small bungalow on their beach front lot with a larger house. In *Dolan*, a dedication of approximately ten percent of the property adjacent to a creek was exacted for public "greenway" and bike path purposes as a condition to expansion of a store on the property. However, no conditions have yet been placed, and no exactions imposed, on Petitioners' property because Petitioners' abandoned their efforts to seek a development permit and instead decided to challenge the underlying ordinance. In this context, the *Nollan-Dolan* doctrine does not apply. As stated in *San Remo Hotel L.P. vs. City and County of San Francisco* (2002) 27 Cal. 4th 643, 670:

> "The 'sine qua non' for application of *Nollan/Dolan* scrutiny is thus the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases' (citation). Only 'individualized

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[3] This amendment increased the potential mitigation ratio by allowing the City Council, in its discretion, to require the permanent protection of up to two acres of agricultural property for every one acre of property removed from agricultural use.

development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan and Dolan.* (citation)."

Second, Petitioners object because the ordinance allows, but does not require, the City Council to impose a replacement ratio of up to two-to-one. However, this provision is discretionary, and the Court cannot say whether this increased ratio would have been imposed in Petitioners' case or that, under appropriate circumstances, such a replacement ratio would always fail to provide "rough proportionality" for the loss. It is for that reason that *Nollan* and *Dolan* limit themselves to specific factual circumstances involving a specific taking.

PETITIONERS HAVE FAILED TO ESTABLISH THAT THEIR APPLICATION WAS COMPLETE PRIOR TO IMPOSITION OF THE MORATORIUM

Petitioners allege that their application should be deemed approved because the City failed to act on their development application within statutory time periods. However, those statutory time periods do not begin to run until complete applications have been submitted. In this case, the evidence establishes that the City timely responded to each submittal with a request for further information under the applicable ordinances and regulations. The evidence further establishes that the City timely requested, but did not receive, submittal of a colors and material board prior to the effective date of the moratorium.

Petitioners' application was therefore incomplete as of the effective date of the moratorium. Accordingly, their application could not be "deemed approved" during the time the moratorium was in effect, because the moratorium

expressly prohibited acceptance of the application during the period thereof.

PETITIONERS' CHALLENGE TO ORDINANCE NO. 536 IS BARRED BY THE STATUTE OF LIMITATIONS

In order to avoid the application of the moratorium to their application, Petitioners assert that Ordinance No. 536 is void for failure to comply with Government Code Section 65858. This challenge, however, is time barred. Government Code Section 65009(c)(1) establishes a 90 day statute of limitations for all actions seeking "[t]o attack, review, set aside, void, or annul" various decisions of a legislative body, including decisions to adopt or amend a general plan or "concerning any of the proceedings, acts, or determinations taken, done, or made prior to" the decision to adopt or amend the general plan. Because the decision to impose the moratorium was inextricably linked to the GPA, any challenge to enactment of the moratorium was required to be filed within 90 days.

CONCLUSION

For all of the foregoing reasons, the petition of writ is denied, and Judgment shall be entered in favor of Respondents/Defendants and against Petitioners/Plaintiffs.

Respondents/Defendants shall recover their costs of suit, and shall prepare a proposed Judgment.

Dated: August 24, 2004

/s/

MARTIN J. TANGEMAN
JUDGE OF THE SUPERIOR COURT